No. 96-49

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ESTATE OF MARY VIRGINIA BUICE, DECEASED and WILLIAM RAMSAY BUICE, ADMINISTRATOR OF THE ESTATE OF MARY VIRGINIA BUICE, DECEASED,

Petitioners,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether a judgment creditor in a garnishment action against a judgment debtor's insurer may rely upon collateral estoppel to preclude the insurer from litigating coverage when the courts below found no duty to defend the insured and also found no coverage.

LIST OF PARTIES

Estate of Mary Virginia Buice, Deceased — *Petitioner*

William Ramsay Buice, Administrator of Estate of Mary Virginia Buice, Deceased — *Petitioner*

Logan & Bise — *Attorneys for Petitioner*

United States Fidelity & Guaranty Company — *Respondent*

Brown, Watt & Buchanan, P.A. — *Attorneys for Respondent*

Pursuant to Supreme Court Rule 29(6), United States Fidelity & Guaranty Company's parent company is United States Fidelity & Guaranty Corporation and its non-wholly owned subsidiaries are as follows:

1. Ballston U.S.F. & G. Holding Company, Inc.; and

2. TNP Office, Inc.

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OPINIONS BELOW

Petitioners, Estate of Mary Virginia Buice, Deceased, and William Ramsay Buice, Administrator of the Estate of Mary Virginia Buice, Deceased (hereinafter "Buice"), instituted a garnishment action against Respondent, United States Fidelity & Guaranty Company (hereinafter "U.S.F. & G."), in the United States District Court For The Southern District Of Mississippi. On April 12, 1994, the District Court entered its bench opinion releasing U.S.F. & G. from the writ of garnishment.

The United States Court of Appeals For The Fifth Circuit entered its *per curiam* judgment affirming the District Court's ruling on March 7, 1996. Buice moved for a rehearing of this judgment which was denied on April 8, 1996. Buice has sought review of the Fifth Circuit's judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is one of three actions filed as a result of a highway accident. They were (1) a wrongful death action which resulted in a default judgment against Steve Knight and his businesses, (2) a bad faith action by Knight against United States Fidelity & Guaranty Company, claiming there was coverage and a duty to defend, and (3) a garnishment action against United States Fidelity & Guaranty Company by the Buice estate attempting to collect on the default judgment against Knight.

Briefly stated, in the bad faith suit filed by Knight, the District Court held there was no coverage and no duty to defend, and that decision was affirmed by the Fifth Circuit. Certiorari was denied. The District Court, in the garnishment action, dismissed the garnishment, and the Fifth Circuit affirmed. Certiorari is now sought by Petitioner, claiming issue preclusion from the original wrongful death suit.

Petitioner Buice initially filed a wrongful death action against Steve Knight, Jr. Steel Fabricators, Inc. and Steve Knight, Jr., Individually, d/b/a Steve Knight, Jr. Steel Fabricators, Inc. ("Knight"), for the death of Mary Virginia Buice. The Complaint, filed on August 17, 1987, alleged that Gary Brock, an employee of Knight, pursuant to the course and scope of his employment by Knight, struck and killed Ms. Buice on July 6, 1984. (R. 1).

Knight conducted business operations known as Steve Knight Jr. Steel Fabricators, Inc. Knight operated a gravel pit in Nicholson, Mississippi, and owned a steel barge fabrication plant at Port Bienville in Pearlington, Mississippi. Gary Brock was an employee of Knight during July of 1984.

Respondent, U.S.F. & G., had in effect three (3) policies for Knight's business during the period November 11, 1983 to November 10, 1984: a business auto policy, No. BAP1401146688; a trucker's policy, No. 026084300; and a general liability policy, No. 025165294. (R. 1252). Burt Young, of the Crystal Springs Insurance Agency, an authorized U.S.F. & G. agency, was the agent that sold, collected the premiums, and received a commission on all of the business insurance policies for Knight's business.

Regarding coverage by U.S.F. & G., the business auto policy issued to Knight contained an endorsement JXN154-B, which provided that:

> It is agreed that the unqualified word "insured" wherever it is used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.

> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used *solely for business purposes in connection with your business.*

(Emphasis added) (R. 850). The above restrictive non-owned vehicle endorsement would have provided coverage only if Brock's vehicle was being used "solely" for the business purposes of Knight at the time of the accident.

On the night of the accident, Brock was driving his own personal pickup truck. Brock had purchased the pickup truck that he was driving from Knight, his employer, about two months prior to the accident. (T. 58). Knight had transferred title to the pickup to Brock to enable Brock to obtain financing on the vehicle. (T. 92). The truck was removed by endorsements from Knight's business auto policy on June 1, 1984. Brock had obtained a liability insurance policy on the pickup with Reliance Insurance. The policy limits on the Reliance coverage were subsequently paid to the Buice Estate.

The accident occurred late Friday night on July 6, 1984, when Gary Brock, driving his own personal pickup, and driving while intoxicated, drove down the wrong side of Highway 90 and struck the vehicle of Mary Virginia Buice, resulting in her death.

On the date of the accident, Gary Brock had worked at Knight's gravel pit in Nicholson, Mississippi. (T. 50). That evening, Brock went over to Port Bienville in Pearlington, Mississippi, to collect his pay. Upon arrival in Pearlington, Brock took a shower, cleaned up, and changed clothes. (T. 55). It was here at Knight's operation in Pearlington that Brock was able to use the services of a trailer on the premises which

contained living accommodations and a kitchen, complete with a table and groceries. (T. 55). Brock was living at this trailer at the time of the accident. (T. 56).

After having been paid, and following a change of clothes and cleaning up, Brock decided to go to Slidell, Louisiana. (T. 56). Brock stated that he went to Slidell every Friday. *Id.* Brock testified that he went by one Brenda Hamilton's house to see her. (T. 57). Brock then went to Catfish Charlie's to eat dinner and have some beer. *Id.* After eating, Brock stopped at a Time Saver convenience store, purchased some more beer, and then headed back to Mississippi. *Id.* Subsequently, Brock crossed the center line on Highway 90 and collided with Ms. Buice's vehicle, resulting in her death.

Brock stayed at the Port Bienville property when he was working for Knight. (T. 94). Knight testified that Brock stayed in a trailer on the Port Bienville premises as part of his salary. (T. 98). Knight stated that the reason Brock had to come back from Slidell to Mississippi was for the purpose of meeting a barge that night. (T. 94). After being confronted with contradictory deposition testimony that he gave in 1988, in which he stated that there was not a barge expected at the Port Bienville site, Knight stated that he made a mistake in his earlier testimony. (T. 96). Knight continued in explaining that he was in bankruptcy at the time and had just lost his representation from an insurance company. (T. 96).

Glenda Hunnicutt, Knight's secretary, notified Burt Young, the agent, of the accident the following Monday. (T. 60). Hunnicutt stated that Knight stopped by her house on Saturday and told her about the accident. (T. 67). Knight further told Hunnicutt to call Burt Young the following Monday and report the accident. *Id.* Hunnicutt spoke with Burt Young's secretary, Gay Powell, and informed her of the accident. (T. 68).

Hunnicutt then spoke with Young concerning the accident. Hunnicutt understood that Young would "handle it." (T. 68). Hunnicutt testified that she did not discuss with Knight whether Brock was in fact on duty or doing something for the company at the time of the accident. (T. 72).

Knight had several policies with Respondent, United States Fidelity and Guaranty Company, at the time of the accident. U.S.F. & G. hired attorney Stanford Morse to represent Knight and an answer was filed on August 15, 1988. (R. 118). The answer admitted that Brock was negligent, was under the influence of intoxicating beverages, but denied that Brock was acting in the course and scope of his employment at the time of the accident. Subsequently, it was determined by U.S.F. & G. that there was no coverage for the vehicle being driven by Brock at the time of the accident and that Morse should withdraw from Knight's defense. (R. 132).

Knight did not tell U.S.F. & G. or Burt Young when he was sued by the Buice Estate. (T. 101). Knight testified that his only contact with U.S.F. & G. was through Stanford Morse, the attorney hired by U.S.F. & G. to represent Knight. (T. 103). Knight met with Stanford Morse regarding coverage under the applicable policies. (T. 103). Knight testified that Morse instructed him to retain a lawyer. (T. 103). Morse subsequently was allowed by the court to withdraw as counsel for Knight. (R. 243).

Forrest Holder, Sr., a former claims office supervisor for U.S.F. & G., with 35 1/2 years in the insurance industry, testified that in 1988 he became aware of the Buice accident. (T. 243-44). Holder determined that there was no coverage afforded the Brock vehicle under any of the U.S.F. & G. policies in effect at the time. (T. 246). Holder testified that the Brock vehicle was not listed on the trucker's policy or the BAP. (T. 246-47). He

continued by stating that the comprehensive general liability policy did not extend coverage to automobiles. (T. 247). Holder opined that the business auto policy's restrictive non-owned vehicle endorsement did not provide coverage because the vehicle was not being used solely for business purposes at the time of the accident. (T. 248).

Darwin Ezell, a claims adjuster with 27 years of experience at U.S.F. & G., stated that it was his determination that there was no coverage under the policies. (T. 277). With respect to the information U.S.F. & G. possessed relative to the facts of the accident, Ezell stated that U.S.F. & G. had a copy of the investigating officer's report, of Brock's insurance policy, and had knowledge of the facts of Brock's previous manslaughter case arising out of the accident, along with copies of the three relevant policies issued to Knight at the time U.S.F. & G. determined that there was no coverage. (T. 284).

The Buice Estate filed an Amended Complaint on or about December 27, 1988. (R. 228). Morse was then allowed to withdraw as counsel of record for Knight by court order of January 23, 1989. (R. 243).

On March 30, 1989, the Estate of Buice filed its Motion to Strike Answers And Enter Default As To Knight. (R. 290). The District Court entered a default judgment in the amount of $1,173,591 against Knight on June 18, 1990. (R. 452). The judgment, based on the Magistrate Judge's Report and Recommendation, found the accident was caused by Brock's negligence and that Brock was in the course and scope of his employment with Knight at the time of the accident. (R. 449-51). Issues of policy coverage were not addressed in either the Report and Recommendation or the judgment. The court did not rule as to coverage.

Following Morse's withdrawal, Knight went and talked to attorney Joe Montgomery. (T. 103). Knight stated that no other attorney appeared on Knight's behalf to defend him in the Buice lawsuit. (T. 104). Knight received several letters from Morse after his withdrawal advising a default was about to be taken. (T. 104). Knight stated that Joe Montgomery also got some letters from Morse. Knight authorized Montgomery to "do anything you need to do" on Knight's behalf in the suit. (T. 104, 116). Montgomery appeared as counsel for the Plaintiff in Young's deposition held on October 24, 1989. (R. 1258). Montgomery also appeared on Knight's behalf at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (R. 1259). Nevertheless, Knight took no action to defend himself and a default judgment was taken in June of 1990 for $1,173,591.

On September 26, 1990, the Estate of Buice filed a suggestion of writ of garnishment on judgment against U.S.F. & G. and excess carrier Chicago Insurance Company ("Chicago").[1] (R. 454). The suggestion for writ of garnishment contained no language regarding the proposition that U.S.F. & G. or Chicago were somehow precluded from contesting matters of coverage as a result of the default judgment. (R. 1268).

On November 19, 1991, the Buice Estate moved for partial summary judgment based in part of Knight's answer to the original Complaint and the Magistrate's Report and Recommendation. (R. 622). On March 10, 1992, the District Court denied Buice's Motion for Partial Summary Judgment in its Memorandum Opinion. (R. 725). Specifically, the court held that there was "a material question of fact as to whether the vehicle was used *solely* for business purposes" as described in the endorsement JXN154-B to the business auto policy. The court went on to state that the use of Brock's vehicle for personal

1. Pursuant to a joint motion by the Buice Estate and Chicago, Chicago was dismissed from this matter by entry of dismissal dated March 21, 1996.

reasons "gives rise to a question of fact as to whether the vehicle was covered under the provisions of the policy in effect at the time of the accident." (R. 729). The Buice Estate moved for reconsideration or, alternatively, for interlocutory appeal, but this was denied by the Court. (R. 945). In denying Buice's motion, the Court's Memorandum Opinion of September 25, 1992 explained its reasonings:

> Although the Memorandum Opinion issued by the United States Magistrate Judge indicated that Brock was acting within the scope of his employment at the time of the accident, the opinion also indicates that Brock had been on a personal mission prior to the accident. The use of the personal vehicle for personal reasons gives rise to questions of fact as to whether the vehicle was covered under the provisions of the policy in effect at the time of the accident.

(R. 947). The Court continued to hold that there were "insufficient facts for determination of whether U.S.F. & G. had a duty to defend in the first lawsuit and whether that duty was breached by some actions taken by U.S.F. & G. during that suit." (R. 948).

Knight subsequently brought a bad faith lawsuit against U.S.F. & G. for alleged wrongful failure to defend in the Buice matter. The Knight bad faith action was consolidated then later severed for purposes of trial from the Buice garnishment action. On October 12, 1992, U.S.F. & G. filed a motion for summary judgment as to Knight's bad faith claims. On November 16, 1994, the District Court granted summary judgment to U.S.F. & G. after finding that its actions in withdrawing its defense of Knight were reasonable according to law and did not

rise to the level of malice or gross negligence and reckless disregard sufficient to trigger punitive damages. The court further held that U.S.F. & G. had an arguable reason to deny the claim at the time it made the decision to withdraw from Knight's defense. On November 29, 1994, the District Court entered judgment dismissing Knight's action against U.S.F. & G. with prejudice.

Knight appealed to the Fifth Circuit, and, on or about September 21, 1995, the Court of Appeals entered its judgment and opinion affirming the District Court's judgment. After Knight filed his petition for rehearing, the Fifth Circuit entered its order denying the petition on November 2, 1995. Knight then filed a petition for writ of certiorari which this Court denied on or about April 15, 1996.

On November 16, 1992, the Buice Estate resubmitted its Motion for Partial Summary Judgment. (R. 1109). Buice asserted that the underlying facts regarding the accident of July 6, 1984 were allegedly sufficient to establish a duty to defend on the part of U.S.F. & G. and that U.S.F. & G. had breached such duty. Buice's resubmitted Motion for Partial Summary Judgment was also denied by the court.

On December 14 and 15, 1992, the garnishment action was heard before the Honorable Walter J. Gex, III, District Judge for the Southern District of Mississippi. On April 21, 1994, the District Court entered its Bench Opinion releasing U.S.F. & G. and Chicago from the garnishment action, specifically finding that Brock was on a personal mission at the time of the accident and that Brock was not using his pickup truck "solely for business purposes" which might otherwise trigger coverage under the business auto policy. (R. 1273).

A judgment was entered on or about May 4, 1994. (R. 1280).

The Buice Estate filed a Notice of Appeal on May 25, 1994. (R. 1281). After oral argument, the Fifth Circuit entered its *per curiam* judgment affirming the District Court's ruling on March 7, 1996. Buice moved for a rehearing of this judgment which was denied on April 8, 1996. Buice filed the present Petition for Writ of Certiorari on July 8, 1996.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR THIS COURT TO REVIEW THE FIFTH CIRCUIT'S RULING BASED UPON WELL-SETTLED PRINCIPLES OF MISSISSIPPI INSURANCE LAW.

The present controversy between a judgment creditor in a garnishment action and an insurer is not the type of case worthy of this Court's limited judicial resources. The Fifth Circuit and the District Court both found under well-settled principles of Mississippi insurance law that there was no coverage under the business auto policy issued to Knight for Buice's garnishment claims. Buice's petition should be denied as this Court does "not ordinarily review the holding of a court of appeals on a matter of state law." *Pierson v. Ray,* 386 U.S. 457, 559 n. 12 (1967). Further, this Court will "generally accord great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 484 n. 13 (1986).

Essentially, Buice maintains that the lower court misapplied rules of issue preclusion in successive diversity actions. This Court should decline certiorari jurisdiction as such a writ "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

II.

BUICE'S ALLEGED "CONFLICT" AMONG THE CIRCUITS DOES NOT WARRANT CERTIORARI REVIEW.

Buice maintains that there is a conflict among the federal circuits regarding whether to apply federal or state rules of preclusion of a federal diversity judgment in a subsequent federal diversity action. Buice concedes that the majority rule, as is the case in the Fifth Circuit, is that "when a federal court renders a decision in a diversity case, the decision's preclusive effect is measured by federal principles of preclusion." *Terrell v. DeConna*, 877 F. 2d 1267, 1270 (5th Cir. 1989).

Buice contends that the District Court erroneously applied the principles of federal collateral estoppel to the facts of this case. Specifically, Buice asserts that the issue of employment status of Brock at the time of the accident was precluded by the previous default judgment determination which found that he was in the course and scope of his employment at the time of the accident. Buice then goes on to argue that the substantive laws of the state of Mississippi governing indemnitor/indemnity collateral estoppel should have been applied here. Buice has not cited, nor can counsel for U.S.F. & G. locate, any case authority setting forth the alleged substantive law governing indemnitor/ indemnity collateral estoppel. However, under both federal and state rules of collateral estoppel, such doctrine "only bars matters actually litigated in the prior action." *McIntosh v. Johnson*, 649 So. 2d 190, 193 (Miss. 1995); *American Casualty Co. v. United Southern Bank*, 950 F. 2d 250, 253 (5th Cir. 1992). In this matter, the question of coverage was not litigated at the default judgment stage. Such matters were litigated, however, in the garnishment action with the result being a correct finding by the court that no coverage existed.

The application of state or federal collateral estoppel was not warranted under the facts of this case. Simply put, the District Court's analysis of federal collateral estoppel as opposed to state collateral estoppel would have yielded the same result had the latter doctrine applied. The fact of the matter is that coverage was not actually litigated in the default judgment, therefore U.S.F. & G. was properly entitled to rely upon the exclusion in the business auto policy during the subsequent garnishment trial. Buice's reference to an asserted conflict in the federal circuits avails it little. Even so, this Court has recently passed upon the opportunity to disturb the majority rule, as found in the Fifth Circuit, that federal *res judicata* rules apply in resolving the preclusive effect of prior diversity actions. *Travelers Ins. v. St. Jude Hospital of Kenner, LA*, 37 F. 3d 193 (5th Cir. 1994), *reh'g denied*, 41 F. 3d 1666, *cert. denied*, __U.S.__, 115 S. Ct. 1696 (1995).

Buice's concern of an alleged split in the federal circuits over which rule of collateral estoppel to apply, in an attempt to vest this Court with jurisdiction, amounts to a red herring. Buice eventually sets forth the applicable rule that in order to make out a *prima facie* case of collateral estoppel on a coverage issue, the plaintiff must first show that the insurer had a duty to defend its insured in the underlying action. (Pet. 15.) U.S.F. & G.'s alleged duty to defend Knight in the underlying Buice action will now be discussed.

III.

COLLATERAL ESTOPPEL DOES NOT OPERATE TO BAR LITIGATION OF COVERAGE ISSUES AS U.S.F. & G. OWED NO DUTY TO DEFEND.

Essentially, Buice argues that U.S.F. & G. had a duty to defend Knight in the Buice action, and that since U.S.F. & G.

chose to withdraw from that defense, it is estopped to raise coverage exclusions under the policy. Buice cites *Southern Farm Bureau Casualty Co. v. Logan,* 119 So. 2d 268 (Miss. 1960) for the proposition that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not estopped to do so if its action does not result in any prejudice to the insured. U.S.F. & G. submits that this is the real collateral estoppel rule that Buice inartfully tries to misapply in its petition. Nevertheless, the District Court has already ruled in the Knight bad faith action that there was no duty upon U.S.F. & G. to defend Knight in the Buice lawsuit. The District Court's ruling was affirmed by the Fifth Circuit by reported opinion in *Knight v. U.S.F. & G.,* 65 F. 2d 34 (5th Cir.), *cert. denied,* __U.S. __, 116 S. Ct. 1418 (1996), and Knight's petition for writ of certiorari in that matter was denied by this Honorable Court. Buice devotes much of its petition to rehashing the law regarding an insurer's duty to defend and its contentions that there was such a duty under the facts of the Buice accident.

The duty to defend argument is foreclosed by the law of the case doctrine. This doctrine holds that "an issue of law or fact decided on appeal may not be reexamined either by the District Court on remand or by the appellate court on a subsequent appeal." *Illinois Central Gulf R.R. Co. v. Int'l Paper,* 889 F. 2d 536, 539 (5th Cir. 1989). Further, the denial of the petition for writ of certiorari in the Knight bad faith action arguably makes the legal conclusions of the Court of Appeals' prior decision final and the law of the case, and Buice is barred from attempting to relitigate them. *Constant v. United States,* 929 F. 2d 654, 657 (Fed. Cir. 1991).

Assuming *arguendo* there was a duty to defend, which U.S.F. & G. and all three courts have expressly found is not the case, there has been no showing of prejudice against the insured

to warrant an estoppel. The District Court discussed the issue of prejudice in its ruling:

> In the instant case, the insurer began representation of the insured until U.S.F. & G. was able to determine that policies did not afford coverage for the incident. At that time, Morse notified Knight that he would have to retain other counsel. Knight testified that he consulted with Montgomery as soon as Morse indicated that U.S.F. & G. would not continue a defense on Knight's behalf. Knight stated that he told Montgomery to "do whatever was necessary" to assist his defense. Indeed, Montgomery wrote several demand letters to U.S.F. & G. for Knight and appeared at depositions as his attorney. *The Court cannot consider that U.S.F. & G.'s actions prejudiced Knight as the insurer continued to deny coverage and took no steps in furtherance or opposition to Knight's defense after their denial.*
>
> * * *
>
> The default judgment, entered a year and eight months after U.S.F. & G.'s withdrawal was rendered without opposition to the assertions that Brock was acting "within the scope of his employment" at the time of the accident. (Trans., p. 382; Chi - 38, p. 2.) Generally, denial of liability is estopped when the insurer withdraws from the defense of the insured, if the insurer's conduct results in prejudice to the insured. *Southern Farm*

> *Bureau Casualty Co. v. Logan*, 238 Miss. 580, 119 So. 2d 268 (1960). Knight went to another attorney after U.S.F. & G. withdrew from his defense. Neither Knight nor the attorney appeared on Knight's behalf when the default judgment was entered. This unfortunate turn of events cannot, however, be attributed to U.S.F. & G.'s withdrawal.

(R. 1270, 1276) (emphasis added). Thus, even if Buice had standing, it cannot claim that Knight was prejudiced as a result of U.S.F. & G.'s actions.

Despite the fact that a previous judgment may have found an insured liable, courts have consistently held that an insurer still has the right to challenge questions that may make it liable on its contract. In denying an application of collateral estoppel to an insurer, the Fifth Circuit held the following:

> Although the insurers owed [the insured] a duty to defend, they do not, even by having breached that duty, *necessarily owe it a duty to pay.* This Court very recently affirmed that a "finding of [the insured's] liability, to which [the insurer who breached its duty to defend] is now bound, is distinct from the question of coverage, which cannot be created *ex nihilo* by estoppel.

Enserch Corp. v. Shand Morahan & Co., 952 F. 2d 1485, 1493 (5th Cir. 1992) (quoting *Hartford Casualty Co. v. Cruse*, 938 F. 2d 601, 605 (5th Cir. 1991)).

Furthermore, an insurer is only estopped from disputing its own liability for the insured's judgment when the issue of

coverage was addressed in the previous suit. *Enserch*, 952 F. 2d at 1491. In this case, the issue of coverage was neither addressed nor adjudicated in the default judgment. Therefore, collateral estoppel cannot be applied. *See Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F. 2d 1124 (5th Cir. 1993)(insured's liability and whether there is concomitant coverage are separate and distinct matters and prior judgment establishing liability is not binding in subsequent proceeding on coverage).

IV.

LOWER COURT CORRECTLY DETERMINED THERE WAS NO COVERAGE UNDER THE BUSINESS AUTO POLICY.

Since collateral estoppel did not foreclose U.S.F. & G. from litigating coverage, the District Court allowed the garnishment trial to adjudicate it. In the absence of a showing of coverage, Buice may not garnish upon the U.S.F. & G. policy. The business auto policy contained a plain and clear restrictive, non-owned vehicle endorsement, JXN154-B, which provided coverage only if the vehicle was being used "solely for the business purposes" of the insured, Knight. In this case of contract interpretation, the trial court was correct in its finding of no coverage under the facts at bar.

U.S.F. & G. submits that the District Court made a proper and just determination of no coverage in view of the evidence presented at the two day trial. The District Court's thoughtful and reasoned analysis of facts surrounding the accident in view of the contract provisions certainly comported with Mississippi insurance law. It is clear from the evidence and testimony presented at trial that Gary Brock was not using his personal vehicle "solely for the business purposes" of Knight at the time of the accident. As the District Court aptly noted:

In a non-jury case, the Court must make findings of fact and credibility determinations. *Crosby Mississippi Resources v. Florida Gas Transmission Co.*, 815 F. Supp. 977, 980 (S.D. Miss. 1993). The testimony, exclusive of self-serving testimony, establishes that Brock was *not using the truck solely for the business purposes* of SKSF [Steve Knight, Jr. Steel Fabricators] at the time the accident occurred. Brock was not paid for the time spent traveling to Slidell for the purpose of obtaining his evening meal. *Smith v. Anderson-Tulley Co.*, 608 F. Supp. 1143, 1146 (S.D. Miss. 1985), *aff'd* 846 F. 2d 751 (5th Cir. 1988). *Brock was on a personal mission at the time of the accident, with no connection to his employment. Bradley v. Holmes*, 248 Miss. 44, 157 So. 2d 801, 803 (1963).

* * *

There was no evidence that Brock was paid for his time traveling to Slidell, or that Brock was acting under Knight's control or specific directions. Brock's mission for his employer was to tie up the barges when the barges arrived at the Port Bienville facility. In order to accomplish this "mission" Brock had to reach the facility. The Buice accident occurred before Brock reached Port Bienville. Therefore, *there is no evidence that Brock's trip in his private truck was "solely for business purposes." Seedkem*

> *South, Inc. v. Lee*, 391 So. 2d 990 (Miss. 1980); *see Luther McGill, Inc. v. Cook*, 306 So. 2d 304, 306 (Miss. 1975); *Price v. Colony Ins. Co.*, 520 So. 2d 964, 966-67 (La. 1987), *writ denied*, 522 So. 2d 561.

(R. 1273, 1275).

It is abundantly clear that "solely for business purposes" is a great deal more restrictive than the broad words "course and scope of employment," which were in the default, but not in the insurance policy.

Thus, after a review of all the evidence and testimony presented at trial, the District Court correctly held that there was no coverage under the business auto policy sufficient to allow Buice to garnish successfully upon said policy. In the absence of coverage, the Court properly entered a judgment releasing U.S.F. & G. from the garnishment action.

After investigating the claim, U.S.F. & G. determined there was no coverage under the business auto policy and withdrew its defense of Knight. The garnishment trial validated this decision by finding that there was no coverage under the policy for the accident. As noted by one court under a similar fact scenario,

> It is undoubtedly true that when any substantial question as to coverage exists, it may involve some risk on the part of the insurance company to refuse to defend. But in this instance, the judgment of the company in so refusing was vindicated by the finding of the trial court that the defendant, Parks, was not driving the car with the permission of the owner and was thus not covered by the policy.

McCarty v. Parks, 564 P. 2d 1122, 1124 (Utah, 1977). *See also, Sentinel Ins. v. First Ins. of Hawaii*, 875 P. 2d 894 (Hawaii 1994)(little justification of the rule of collateral estoppel in cases where there is no actual coverage and no waiver or estoppel has taken place.) Similarly, the District Court found that Brock was not using his vehicle solely for the business purposes of Knight so as to require U.S.F. & G. to provide coverage or a defense.

The courts below properly analyzed the state and federal doctrines of collateral estoppel and found that both were inapplicable to Buice's claims against U.S.F. & G. Their decisions were based upon well established principles of settled law. The analysis under federal issue preclusion rules, even if such rules differed from the Mississippi rules, which they do not, does not result in a violation of the principles set forth in *Erie v. Tompkins*, 304 U.S. 64 (1938), requiring that state law govern substantive issues in diversity cases. *Terrell*, 877 F. 2d at 1272. The instant case is simply not deserving of this Court's precious time and resources.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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